STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Whitbeck, P.J., and Smolenski and Cooper, JJ.

PAUL DRESSEL and THERESA DRESSEL,

Plaintiffs-Appellees,

v

AMERIBANK,

Defendant-Appellant.
_____/

Supreme Court Docket No. 119959

Court of Appeals Docket No. 222447

Kent County Circuit Court
No. 98-013017-CP

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Jurisdiction is vested in this Court pursuant to MCR 7.301(A)(2) and MCR 7.302. This appeal arises from the trial court's July 12, 1999 Opinion, granting Defendant-Appellant AmeriBank's motion for summary disposition. Plaintiffs-Appellees timely appealed the decision to the Michigan Court of Appeals, which issued a decision on August 3, 2001, reversing the trial court's decision. AmeriBank filed an Application for Leave to Appeal on August 24, 2001. In an Order entered April 23, 2002, this Court granted AmeriBank's Application for Leave to Appeal. For the reasons set forth below, AmeriBank respectfully requests that this Court reverse the decision of the Court of Appeals, and reinstate the judgment of the Circuit Court.

STATEMENT OF QUESTIONS INVOLVED

1. Does the act of filling in blanks on a standard form document used in a loan transaction constitute the practice of law?

   Appellant: No.
   Appellee: Yes.
   Court of Appeals: Yes, if a separate fee is charged.

2. When AmeriBank filled in blanks on a standard loan document form for its own benefit and protection, was it acting pro se such that its activity did not constitute the unauthorized practice of law?

   Appellant: Yes.
   Appellee: No.
   Court of Appeals: No.

3. Even assuming the practice of law, was this act of filling in the blanks on loan documents ancillary to AmeriBank's business such as to exclude it from the ban on the unauthorized practice of law?

   Appellant: Yes.
   Appellee: No.
   Court of Appeals: No.

4. Can an amendment to the Michigan Consumer Protection Act, made well after the decision of the trial court, nevertheless apply to this transaction?

   Appellant: No.
   Appellee: Did not address this issue below.
   Court of Appeals: Yes.

5. Can the Credit Reform Act be used as a basis for a Michigan Consumer Protection Act claim notwithstanding the fact that by its terms it does not apply to the loans involved in this case?

   Appellant: No.
   Appellee: Did not address this issue below.
   Court of Appeals: No.

6. Assuming the applicability of the Credit Reform Act, was the fee charged in this case "excessive," and therefore a violation of the act, simply because the fee was charged for services that constituted the unauthorized practice of law?

Appellant: No.
Appellee: Did not address this issue below.
Court of Appeals: Yes.

SUMMARY OF ARGUMENT

This case involves the routine lender practice of filling in information in blanks on standard mortgage loan documents. Plaintiffs contend, and the Court of Appeals held, that filling in the blanks on a pre-printed form constitutes the unauthorized practice of law if a "separate" charge is made for the service. This position, however, improperly focuses on the existence of the fee, rather than the facts of the case or economic reality.

The conduct at issue in this case does not involve the exercise of legal judgment, the rendering of legal advice about the effect of loan documents, or even the drafting of the documents themselves. AmeriBank is not alleged to have held itself out as Plaintiffs' counsel, or to have prohibited Plaintiffs from retaining counsel of their choosing. Instead, AmeriBank has only filled in blanks on standard form documents. This ministerial act is not the practice of law, and the fact that a separate fee is charged does not somehow transform it into the practice of law.

More important, Michigan statutes prohibit a corporation from practicing law only for persons other than itself. The record in this case is unequivocal: When Defendant-Appellant AmeriBank prepared loan documents, it did so for its own protection. AmeriBank was acting "pro se," and not for the benefit of another person. Plaintiffs and the Court of Appeals note the fact that AmeriBank passed the cost of preparing documents on to its customers and look no further. The economic realities of business, however, require that lenders recoup their costs – either through a separate charge, or indirectly through higher interest rates. Recouping costs does not change the fact that the documents are being prepared for the lender. Filling out form mortgage documents for the protection of the bank is simply not the unauthorized practice of law.

If this Court were to hold that AmeriBank was engaged in the unauthorized practice of law, then it would be necessary for the Court to also address Plaintiffs' claim under

the Michigan Consumer Protection Act. The Court of Appeals' ruling on that claim was as flawed as its ruling that AmeriBank engaged in the unauthorized practice of law. This Court, in *Smith v Globe Life Insurance Company*, 460 Mich 446; 597 NW2d 28 (1999), construed Section 4(1) of the Michigan Consumer Protection Act, MCL 445.901 *et seq.* ("MCPA"), to exempt from the MCPA all regulated businesses while engaged in authorized transactions, except where the conduct challenged was made unlawful by one of the statutes specifically referenced in Section 4(2) of the MCPA. In *Smith*, the challenged conduct was allegedly unlawful under Chapter 20 of the Insurance Code, which Code was, at that time, specifically mentioned in Section 4(2) of the MCPA.

Plaintiffs-Appellees did not brief or argue the applicability of the MCPA, or the exemption of Section 4(1), or the exception to the exemption of Section 4(2) in their appeal to the Court of Appeals. Neither of the parties addressed the exception upon which the Court of Appeals relied for its decision that the MCPA applied, i.e., Section 4(2). Though neither briefed nor argued by Plaintiffs, the Court of Appeals reinstated the MCPA count. The lack of briefing perhaps explains why the Court of Appeals made four serious errors.

First, the court held that AmeriBank could be sued under the MCPA for conduct made unlawful under the Michigan Savings Bank Act, even though the Michigan Savings Bank Act was not referenced in the MCPA until a statutory amendment made well after Judge Kolenda had dismissed the MCPA claim. Second, the court concluded that AmeriBank violated the Michigan Savings Bank Act, even though that act did not apply to AmeriBank, a federally chartered savings bank, for most of the class period. Third, in holding that the Savings Bank Act was violated, the court relied upon an alleged Credit Reform Act violation. But the Credit Reform Act, by its very terms, does not apply to Plaintiffs' transaction. Finally, the court held

that AmeriBank violated the Credit Reform Act's prohibition against "excessive charge" by passing on the cost of an unauthorized practice, ignoring the fact that "excessive charges" is a defined term in the Credit Reform Act dealing only with the amount of the fee and having nothing to do with the reason for the fee.

This Court can and should establish the guidelines concerning the unauthorized practice of law in this state. To date, the Court has done so by balancing the needs of business with the need to protect consumers from those who are not trained in legal matters. It has cautioned against being overly restrictive and paralyzing business activities, and it has advocated a practical approach that reflects "the everchanging business and social order." *State Bar of Mich v Cramer*, 399 Mich 116, 133; 249 NW2d 1, 7 (1976), *quoting Grand Rapids Bar Ass'n v Denkema*, 290 Mich 56, 64; 287 NW 377, 380 (1939). The Court of Appeals in this case has not balanced those needs. It has adopted an approach which in the long run benefits no one, harms consumers, and penalizes AmeriBank for engaging in a practice that is commonplace in the industry.

If affirmed, the Court of Appeals' decision will have far-reaching and disturbing effects. The practice challenged in this case – bank personnel filling in the blanks on form loan documents – is universal in Michigan. Banks do not hire lawyers to fill in the blanks on mortgage documents, and doing so would delay closings and increase the cost to the borrower. Indeed, Plaintiffs take pains to emphasize that they do not advocate that attorneys be engaged to prepare loan documents, but only that no charge be levied therefor. There is no allegation of improper preparation of documents, faulty legal advice or any other sort of injury the unauthorized practice statutes were meant to protect against. The Court of Appeals' ruling would treat the unauthorized practice statutes as nothing more than rate control laws – something

the language of the statutes, the decisions of this Court, or common sense would not support. The trial court properly dismissed this case, and its judgment should be reinstated.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This case centers around AmeriBank's charges to its residential mortgage loan customers for "preparation" of loan documents. In fact, the documents in question are all standard forms – either standard industry forms prepared by federal agencies such as the Federal National Mortgage Association ("FNMA"), or forms prepared and reviewed by AmeriBank's counsel. (Pankratz Aff ¶8, Appellant's App at 24a.) When readying a particular loan for closing, bank employees merely fill in blanks on the pre-prepared forms using a computer software program that guides them through the process of inputting information (such as the name of the borrower, the address of the property, the term of the loan, and the interest rate) regarding the transaction. (Pankratz Aff ¶7, Appellant's App at 24a.) The employees are not permitted to change the standard terms of the documents. *(Id.)* Prior to closing, the computer software program generates completed settlement documents. (*See, e.g.,* Mortgage, Appellant's App at 9a-13a.)

During 1997, it cost AmeriBank an average of $1,120 per residential mortgage loan to fill in all of the documents needed for the loan and its processing. (Pankratz Aff ¶5, Appellant's App at 24a.) Of this cost, $400 was passed along to customers in 1997 and early 1998 in the form of a "document preparation fee." (Pankratz Aff ¶6, Appellant's App at 24a.)

Plaintiffs below, Paul and Theresa Dressel, obtained a home mortgage loan from AmeriBank in November of 1997. They were charged the $400 "document preparation fee," and this was the only charge that went to AmeriBank in connection with their loan. (*See* HUD-1 Statement, Appellant's App at 8a.) The Dressels subsequently filed this suit against AmeriBank, claiming that by charging the fee, AmeriBank engaged in the unauthorized practice of law.

AmeriBank moved for summary disposition of Plaintiffs' claim under MCR 2.116(C)(10). Judge Kolenda granted the motion, ruling that the filling in of blanks on

standardized forms is not the practice of law, and, alternatively, that even if it is the practice of law, it is not the unauthorized practice of law because savings banks like AmeriBank are expressly permitted by statute to extend loans to customers and to assess fees in connection with those loans.

Plaintiffs appealed this ruling, and the Michigan Court of Appeals reversed. The Court of Appeals panel held that the preparation of the loan documents, when done for a separate fee, constitutes the unauthorized practice of law. While appearing to acknowledge that companies are permitted to prepare legal documents incidental to their normal business, the Court of Appeals found that where the cost of filling in the blanks is passed along to customers, this transforms the ministerial act into the practice of law. The Court of Appeals further held that, while generally exempt from the MCPA by virtue of Section 4(1) of the Act, these transactions were subject to an exception to that exemption. It held that Section 4(2) excepts an action pursuant to the Savings Bank Act from the exemption of Section 4(1), and found a violation of the Savings Bank Act based on the Credit Reform Act, incorporated therein by reference.

ARGUMENT

I. STANDARD OF REVIEW.

This appeal concerns a review of the trial court's grant of summary disposition to Defendant-Appellant AmeriBank pursuant to Michigan Court Rule 2.116(C)(10). Appellate review of the trial court's decision on summary disposition is conducted de novo. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114; 532 NW2d 866 (1995). When reviewing an order of summary disposition under MCR 2.116(C)(10), the appellate court must determine, based upon available pleadings, affidavits, depositions, and other evidence viewed in the light most favorable to the nonmoving party, whether the moving party was entitled to judgment as a matter of law. *Unisys Corp v Comm'r of Ins*, 236 Mich App 686; 601 NW2d 155 (1999).

II. FILLING IN BLANKS ON STANDARD MORTGAGE FORMS DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.

Michigan has two statutes prohibiting the unauthorized practice of law – one that applies to individuals (MCL 600.916), and one that applies to corporations and associations (MCL 450.681). The second of these provides that "[i]t shall be unlawful for any corporation or voluntary association to practice . . . as an attorney-at-law for any person other than itself . . . ." MCL 450.681 (emphasis added). The statute further states that it "shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute . . . ." *Id.* (emphasis added).

The determination of whether AmeriBank engaged in the unauthorized practice of law is thus a two-step process. The threshold question is whether the conduct in question constitutes the practice of law for any person other than AmeriBank. If filling in blanks on standard, pre-printed mortgage forms to protect one's own interest is not the practice of law for another, that resolves the question. There is no basis – either in law or in common sense – for

the proposition that assessing a charge for conduct that is not the practice of law can somehow convert the conduct into the practice of law.

If the Court determines that filling in the blanks on standard documents meant to protect AmeriBank is the practice of law for another, the Court must then go on to decide whether the conduct constitutes the "unauthorized" practice of law. In this case, the question is whether AmeriBank is lawfully engaged in business authorized by statute. If so, then AmeriBank has not engaged in the unauthorized practice of law.

A. AmeriBank Was Not Engaged in the Practice of Law When It Filled in Blanks on Form Mortgage Documents Meant to Protect Its Own Interests.

1. Filling in blanks on standard mortgage forms is not the practice of law.

In the unauthorized practice of law statutes, the legislature has not defined "the practice of law." In order to determine whether AmeriBank's practice of charging a separate "document preparation fee" for filling in blanks on standard mortgage forms is the unauthorized practice of law, the first step is to examine whether filling in blanks on standard forms is the practice of law at all.

Michigan courts, and those of other states, have had considerable difficulty defining the precise boundaries of "the practice of law." This Court has cautioned that "any attempt to formulate a lasting, all encompassing definition of [the] 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order.'" *Cramer*, 399 Mich at 133; 249 NW2d at 7, *quoting Grand Rapids Bar Ass'n v Denkema*, 290 Mich 56, 64; 287 NW 377, 380 (1939). Defining the practice of law is a balancing act, as courts must "accommodate the need for public protection through restricting the practice of law to members of the bar with the economic and

practical realities of modern society." *Cramer,* 399 Mich at 133; 249 NW2d at 7 (citation omitted). If the practice of law is defined too broadly, it could wreak havoc on the way business is conducted:

> 'It cannot be urged, with reason, that a lawyer must preside over every transaction where written legal forms must be selected and used by an agent for one of the parties. Such a restriction would so paralyze business activities that very few transactions could be expeditiously consummated . . . .'

399 Mich at 133; 249 NW2d at 7, *quoting State ex rel Ind State Bar Ass'n v Ind Real Estate Ass'n*, 191 NE2d 711 (Ind, 1963). Too narrow a definition, on the other hand, would defeat the goal of the unauthorized practice statutes, i.e., to protect the public from mistakes made by those unskilled in legal practice. *Grand Rapids Bar Ass'n v Denkema*, 290 Mich 56, 65; 287 NW 377, 380 (1939). These are the considerations that have traditionally guided this Court's efforts to define the practice of law, and are the considerations that must be taken into account in this case.

"'It is too obvious for discussion'" that representing another party in connection with court proceedings – filing pleadings and appearing in court – is the practice of law. *Detroit Bar Ass'n v Union Guardian Trust Co*, 282 Mich 216, 222; 276 NW 365, 367 (1937), *quoting In re Duncan*, 65 SE 210 (SC, 1909). Outside of the courtroom, however, the contours of the practice of law become much less clear, and the drafting of documents can be particularly difficult to deal with. In *Denkema*, this Court held that preparing wills for others is the practice of law. 290 Mich at 65; 287 NW at 380. *Denkema* also noted that "[t]he preparation of conveyances of real estate and personal property by the defendant for others, for a consideration, comes within the usual and ordinary definitions of 'practice of law.'" 290 Mich at 66; 287 NW at 381 (citations omitted). The Court went on to quote with approval, however, the following statement:

> 'We do not desire to be understood as saying that the mere act of drawing a promissory note, chattel mortgage, real estate mortgage, deed or other similar instruments would constitute the practice of law, where the person so drawing them acts merely as an amanuensis and does not advise or counsel as to the legal effect and validity of such instruments.'

Denkema, 290 Mich at 67; 287 NW at 381, *quoting State ex rel Wright v Barlow*, 268 NW 95, 96 (Neb, 1936). With these varying statements regarding the practice of law in hand, one must examine the particular conduct at issue in this case.

In this case, AmeriBank's employees are not alleged to be giving borrowers legal advice about the effect of the forms they sign or the advisability of signing them, nor are they even claimed to be actually drafting the legal documents involved. The bank employees are merely filling in blanks on standard forms, and are not even allowed to change the standard terms of any of the documents. (Pankratz Aff ¶7, Appellant's App at 24a.) At the trial court level, Judge Kolenda held that these facts demonstrate that AmeriBank was not engaged in the practice of law:

> Plaintiffs do not contend that defendant does anything related to the management and/or presentation of a case in court. Nor do plaintiffs claim that defendant gives any legal advice. Instead, defendant only completes standardized forms by filling in the blanks. It does not assess the legal effect of the information placed therein, nor does it give any advice regarding those documents or their effects. Hence, because no legal training or knowledge are necessary, defendant does not practice law by preparing those documents.

(Op at 4, Appellant's App at 31a.)

In *Miller v Vance*, the Indiana Supreme Court analyzed the precise situation presented here, and reached the exact same conclusion as Judge Kolenda, i.e., filling in blanks on standard mortgage documents is not the practice of law:

> The instant case . . . involves the lay employees of banks performing the routine service of filling in information on standard

> real estate mortgage forms. This service is incidental to and directly connected with the bank's regular business of making loans. The bank employees here were involved in preparing documents for routine business transactions with which they were thoroughly familiar in the same manner in which real estate brokers were involved in preparing documents routinely associated with their real estate transactions. While it is true that the preparation of mortgage instruments might be classified as the practice of law in some circumstances, that is not the case here. It is appropriate for bank employees to fill in the blanks on approved mortgage forms which have been prepared by attorneys in the same manner it is appropriate for real estate brokers to fill in the blanks on standard forms for real estate transactions.

463 NE2d 250, 252 (Ind, 1984)

The Minnesota Supreme Court reached a similar conclusion in *Cardinal v Merrill Lynch Realty/Burnet, Inc*, 433 NW2d 864 (Minn, 1988). In deciding whether a real estate broker's completion of standard forms is the unauthorized practice of law, the court held that if a layperson "as part of his regular course of conduct, resolves legal questions for another – at the latter's request and for a consideration – by giving him advice or by taking action for and in his behalf, he is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind." *Id.* at 868. In the case before it, the court found it dispositive that the plaintiffs did not claim that the forms filled out by the defendant involved anything out of the ordinary or presented difficult questions that had to be resolved by a trained legal mind. *Id.* at 868-869. The court also found it significant that there was no allegation of any lack of competence in documenting the transaction. *Id.* at 869.

This Court has previously cautioned that the definition of the practice of law "'must necessarily change with the everchanging business and social order.'" *Cramer*, 399 Mich at 133; 249 NW2d at 7, *quoting Denkema*, 290 Mich at 64; 287 NW at 380. It cannot be disputed that mortgage lenders today regularly fill in blanks on form documents that have been

developed by federal agencies, secondary market loan purchasers, and their own counsel. Filling in blanks on these pre-printed forms with information such as the borrower's and lender's names and addresses, the interest rate, and the length of the loan – as distinct from actually drafting in the first instance – simply does not rise to the level of the practice of law. It requires no legal training, does not involve the exercise of legal judgment, and does not involve the rendering of legal advice. The bank's employees are merely acting as scriveners, obtaining required information about the particulars of a loan and then filling in blanks on a pile of documents.

While no Michigan case has squarely addressed this issue in the banking context, this Court has clearly suggested that filling in the blanks on a standard form agreement in a property transaction is not the practice of law. In *State Bar of Michigan v Kupris*, the Court declined to enjoin a real estate broker from filling in the blanks on a standard form, saying:

> Is the filling out of blanks in standard forms used in property transactions the practice of law in the general acceptance of the term? Clearly one who limits his activities in the manner indicated may scarcely be said to be engaged in the law business or to be holding himself out to the public as an attorney at law.

366 Mich 688, 694; 116 NW2d 341, 343 (1962).

In *Kupris*, the injunction permitted defendant to fill in the blanks when no charge was made therefor. Plaintiffs will no doubt argue that this makes a difference, but not only is it clear from *Kupris* that the fee was not expressly considered in reaching the decision, but (as will be discussed below) making the fee the outcome determinitive factor makes no sense.

2. AmeriBank's preparation of mortgage documents was done on its own behalf, and not on behalf of the borrower.

MCL 450.681 forbids only the practice of law by a corporation "for any person other than itself." Nothing in the statute prohibits banks from representing themselves, and in this case AmeriBank prepared the documents for its own benefit. Even if filling in blanks on

standard form mortgage documents could be "practicing law" if done for another, AmeriBank was not in violation of this statute because it was acting pro se.

a. This Court's prior opinions, which deal with real estate brokers, are not precedent for this case.

Plaintiffs' arguments below and the opinion of the Court of Appeals are both based in large part on prior decisions of this Court concerning conduct of real estate brokers. There is one critical difference, however, between the activities of a real estate broker and those of a mortgage lender. Although a real estate broker may be "involved" in a conveyance transaction, it is not a party to the transaction. A mortgage lender, by contrast, is truly a party to the financing of the transaction. Its status as a party is critical, because while a real estate broker must, of necessity, act "for a person other than itself" when it drafts documents, the lender can prepare documents for itself. When the lender is acting on its own behalf, it is not engaged in the practice of law for another.[1]

None of the Court's prior decisions concerning the unauthorized practice of law has involved a party to the transaction in question. This case therefore represents one of first impression as to parties acting pro se.

b. If AmeriBank performed legal services, it did so for itself and not for Plaintiffs.

The documents that form the center of this controversy are those prepared by AmeriBank in connection with its financing of Plaintiffs' loan – the Note and Mortgage themselves, and other documents necessary to process and document the loan. (Pankratz Aff ¶¶10, 11, Appellant's App at 25a.) These documents are prepared to protect the bank's ability to enforce the repayment obligation, to comply with the federal regulations imposed on the bank,

[1] It is important to note that the documents in question all relate to the financing of Plaintiffs' mortgage, to which AmeriBank is a party, and not to the conveyance of the property. AmeriBank is not alleged, for example, to have prepared the Buy/Sell Agreement or the deed.

and to provide the bank with the option of later selling the loan on the secondary mortgage market. (Pankratz Aff ¶10, Appellant's App at 25a.) There is no contention by Plaintiffs, and no evidence to support such a contention if it were made, that the documents are prepared for the benefit of the borrower. In *Krause v Huntington National Bank*, one of six cases virtually identical to this one that were filed by Plaintiffs' counsel, Judge Sullivan put it bluntly:

> Does any reasonable person . . . really believe that the instruments prepared by the bank were solely or primarily for the protection of the borrower? The court thinks not.
>
> *Krause*, No 98-00750-CP, slip op at 2 (Kent County Cir Ct, July 23, 1998)

(Appellant's App at 15a). Judge Sullivan recognized that the instruments in question are intended to protect the lender's security interest, and only incidentally benefit the borrower in that, without them, the borrower likely would not be loaned any money. *Id.* at 2-3, Appellant's App at 15a-16a. "What we have here, therefore, is defendant bank representing itself. And the preparation of legal documents, whether or not mere filling in of blanks, is not prohibited by a party in interest to the transaction, such as the bank here." *Id.*

In *Detroit Bar Association*, the plaintiff contended that the defendant, a trust company, engaged in the practice of law when it drafted trust agreements to which it was a party. This Court first stated that revocable trust agreements that do not contain testamentary provisions "are mere agreements between the contracting parties fixing their respective rights and duties." 282 Mich at 228; 276 NW at 369. Analogizing the trust agreements to construction contracts, the Court said:

> Within the limitations indicated, drafting trust agreements is no more the practice of law, nor does it any more contemplate action in or by the courts, than does the ordinary run of agreements in the every day activities of the commercial and industrial world. A construction agreement may be considered as a fair example. If the contract project is of any magnitude it involves the making, the adoption, the interpretation and the execution of plans and

> specifications. It is a matter of common knowledge that often, and perhaps usually, these details are of such a complex and technical character as not to be understood readily by the property owner who is a party to the construction contract. Nonetheless his right to enter into such a contract cannot be questioned nor is it requisite that it be drafted by one skilled in that field. The same may be said of trust agreements of the limited character which the defendant is now contending that it has the right to solicit, draft and consummate with prospective trustors.
>
> *Id.* (emphasis added).

Much like trust agreements, a note and mortgage are merely agreements between a borrower and a lender fixing their rights and responsibilities. And like trust agreements, there is nothing that prohibits either party from entering into the agreements, or requires that the agreements be drafted by an attorney.

3. Passing along the cost of preparing mortgage documents does not convert the preparation into the practice of law for another.

a. The fact that Plaintiffs paid AmeriBank a "document preparation fee" does not change the fact that, if AmeriBank performed legal services, it did so for itself and not for Plaintiffs.

While a charge for preparing documents has sometimes been used as evidence that the preparation of the documents was the practice of law, the charge itself has never been held to be the practice of law. The position urged by Plaintiffs and adopted by the Court of Appeals would have the incongruous result of prohibiting a separate charge by a lender for preparing loan documents, but not in any way preventing the lender from continuing to prepare the documents. Plaintiffs have not requested, and the Court of Appeals' ruling does not dictate, that lenders be prohibited from filling in blanks on standard loan documents. The only prohibition in the Court of Appeals' decision is that no separate charge be assessed. The purpose of the prohibition on the unauthorized practice of law, however, is not to protect the public from

having to pay fees. The purpose is to protect the public from mistakes made by those untrained in legal matters. Prohibiting the charge, while allowing the practice of preparing the documents to continue, does nothing to further this goal.

If filling in blanks on standardized forms is not the practice of law, then passing along the cost of doing so to the borrower cannot make it the practice of law. Judge Kolenda so held, noting that while the charging of a fee might become relevant to the question of whether an activity that is the practice of law was performed on behalf of another, "defendant does not practice law by preparing those documents. That a fee is charged does not transmogrify that activity into the practice of law." (Op at 4, Appellant's App at 31a.)

The Minnesota Supreme Court in *Cardinal* agreed. "Common sense suggests . . . that charging a fee for services which include the preparation of ordinary documentation for a real estate transaction does not convert a practice not otherwise unlawful into the unauthorized practice of law." 433 NW2d at 869. The court ruled that a fee charged for the services is not irrelevant, stating that a fee might indicate that difficult or doubtful legal questions are involved, and is therefore a factor to be considered in determining whether the service is the practice of law. *Id.* But in the case before it, the court found that (just as is in this case) "[t]he thrust of this lawsuit was not that these transactions posed legal questions which demanded the expertise of one learned in the law nor that the plaintiffs were ill served but only that, by charging a separate fee for its services . . . [defendant] engaged in the unauthorized practice of law." *Id.*

While the Court of Appeals in this case gave the issue short shrift, it apparently concluded that, where a fee is charged, the documents must have been prepared as a service for the borrower. In its view, "the separate fee for the preparation of mortgage documents by a bank crosses the threshold of providing services for the bank's own benefit and engaging in a business

where a profit is made from manufacturing legal documents without the requirement of licensure from the state bar." (Op at 5, Appellant's App at 45a.) The Court of Appeals cited no authority for this conclusion, and offered no further rationale other than its view that "[i]f the preparation of the mortgage documents . . . was not a service [for borrowers] . . ., then there would be no basis for the separate charge to defendant's customers." (Op at 5-6, Appellant's App at 45a-46a.)

The Court of Appeals' conclusion is wrong. The "basis" for the "separate charge" is a contract between the bank and the borrower under which, to the extent that market conditions permit it to do so (Pankratz Dep at 23-25, Appellant's App at 20a-22a), the bank passes along to its customer part of its costs of making the loan, and the borrower agrees to reimburse the bank for those costs. That fact does not in any way lead to the conclusion that the bank is furnishing legal services to its borrowers.

When presented with the same argument by Plaintiffs, Judge Kolenda held:

> The charging of a fee is nothing other than passing along costs and attempting to earn a profit. The market system is based on the propriety of that being done by the providers of products and services. Doing that hardly reveals assuming any responsibility to act for somebody else. Claiming otherwise is a rationalization.

(Op at 8, Appellant's App at 35a.) The Court of Appeals disagreed, but had no basis for doing so. It presumed that there would be no basis for passing the fee along to the borrower if the service were not rendered for the benefit of the borrower. That presumption not only lacks factual support in the record, it ignores both the uncontradicted Pankratz affidavit and common sense.

The affidavit of Lee Pankratz, President - Senior Vice President and Chief Lending Officer, is uncontradicted. In that affidavit, Mr. Pankratz unequivocally states that the preparation of the documents was for AmeriBank's benefit, not the borrower's:

> The documents prepared for which the document preparation fee is charged constitute documents needed by AmeriBank to properly process the loan transaction, to document the terms of the loan transaction so that it may enforce and protect its interest in seeking repayment of the loan and so that AmeriBank may, when it so desires, sell residential mortgage loans on the secondary market. AmeriBank prepares these documents to protect its own interest and comply with government regulations and not as a service performed on behalf of borrowers.

(Pankratz Aff ¶10, Appellant's App at 25a.)

The Court of Appeals does not mention this affidavit, but in stating that "there would be no basis for the separate charges" unless the documents were prepared for the borrowers' protection, the Court of Appeals appears to have disagreed with it and with Judge Kolenda's finding that passing along that cost to the borrower is "nothing other than passing along costs . . . [and] hardly reveals assuming any responsibility to act for somebody else." (Op at 8, Appellant's App at 35a.) There is nothing in the record that would justify ignoring the Pankratz affidavit and Judge Kolenda's finding.

In *Krause*, Judge Sullivan concludes that:

> [D]efendant's charging a fee to plaintiffs for document preparation no more creates an attorney-client relationship than a losing party who pays attorney fees after a trial, one who pays attorney fees for his or her spouse in a pending divorce, or sellers of a business who contract with buyers to pay sellers' attorney fees as part of the overall transaction.

Krause, slip op at 4 (Appellant's App at 17a). Judge Sullivan's analysis is correct.

The Court of Appeals' view that the document preparation services must have been performed on behalf of the borrowers because the costs were passed along to them, on the other hand, ignores the record, the realities of the marketplace, and the law.

Lee Pankratz's affidavit shows that the documents were prepared for the benefit of the bank, and that affidavit is uncontradicted. There is no evidence in the record that Plaintiffs

or any other borrowers were misled into relying upon AmeriBank to act as their counsel. There is simply no evidence to support the Court of Appeals' hypothesis that the documents must have been prepared for the benefit of the borrower.

The economic realties of the mortgage market belie the Court of Appeals' conclusion as well. The record demonstrates that it cost AmeriBank $1,120 to process and close a loan. Those costs must be passed along to the customer one way or another – either as a direct, separate charge, or in an increased interest rate. But passing on these costs does not mean that the bank was representing the borrower, anymore than passing along the costs of recording the mortgage (clearly to benefit the bank, but paid for by the borrower), or the cost of private mortgage insurance (to protect the bank in the event of a default, but paid for by the borrower) suggests that the mortgage recording or private mortgage insurance was for the buyer's benefit. As the many amicus briefs filed in this case demonstrate, passing these costs along to the customer is commonplace in the industry – but does not change the fact that the bank is representing itself in the transaction, as it is permitted to do by the statute.

Finally, the ruling below ignores federal law governing mortgage fees. Federal law specifically recognizes that document preparation costs are properly passed on to the customer. Under the Truth in Lending Act, 15 USC §1601, *et seq.*, and implementing Regulation Z, 12 CFR §226.4, a lender is permitted to pass on to the customer costs it incurs in the preparation of notes, mortgages, and "settlement documents" – "a broad term that would seem to encompass any other documents necessary for the closing of a mortgage loan," *Brannam v Huntington Mortgage Co*, 287 F3d 601, 604 (CA 6, 2002), and not include those passed-on costs in the calculation of the finance charge. That is precisely what AmeriBank did in this case: it passed on costs incurred in preparing documents necessary to protect its interests, as it is

permitted to do by federal law. That by no means indicates it was representing the borrower in the transaction.

Thus, the Court of Appeals was simply wrong when it said that "the separate fee for the preparation of mortgage documents by a bank crosses the threshold of providing services for the bank's own benefit" and that "[if] the preparation of the mortgage documents . . . was not a service [for borrowers] . . ., then there would be no basis for the separate charge to defendant's customers." (Op at 5-6, Appellant's App at 45a-46a.) Whether or not the borrower reimburses the bank for its costs of preparing legal documents (whether by a licensed attorney or by bank employees) has no bearing on whether the lender was acting pro se. The position advocated by Plaintiffs, and adopted by the Court of Appeals, either does not recognize, or chooses to ignore, economic reality, record evidence, and federal lending law. Separate fee or no separate fee, AmeriBank was acting on its own behalf when it filled out the paperwork necessary to close Plaintiffs' loan. Even if filling in the blanks on form documents could be termed practicing law, in this case, it was not done for another and is therefore not prohibited by statute.

b. The "separate charge" standard is a rule that does not serve any public policy.

According to the Court of Appeals, AmeriBank may prepare documents for a transaction to which it is a party as long as it does not charge the other party to the transaction a "separate charge," such as a "document preparation fee." The Court of Appeals says that if AmeriBank makes such a "separate charge," then it is engaged in the unauthorized practice of law; but if it does not make such a "separate charge," then the pro se exception applies, and it is not engaged in the unauthorized practice of law. This rule does not serve any useful public policy.

The "separate charge" rule would mean that semantics, rather than substance, would determine whether a business that prepares documents for its own transactions is engaged in the unauthorized practice of law. Anytime any business completes a standard form document, the cost of doing so (along with all other overhead) is eventually passed on to customers, directly or indirectly.

Should the definition of "unauthorized practice of law" turn on semantics? Whether a business invoices a customer for document preparation or simply passes that cost on as part of the price of the goods or services sold should not be determinitive of whether that business engaged in the unauthorized practice of law. Plaintiffs' attempt to penalize AmeriBank for being candid about its allocation of costs elevates semantics over substance. The "separate charge" rule does not serve any useful public policy and this Court should reject it.

B. Even if Filling in Blanks on Standard Mortgage Forms Were the Practice of Law, Preparation of Loan Documents is Essential to AmeriBank's Lawful Business, and It is Therefore Not the "Unauthorized" Practice of Law.

If this Court determines that a lender filling in blanks on standard mortgage forms is the practice of law for another, the question still remains as to whether it is the "unauthorized" practice of law. The unauthorized practice of law statute provides that it "shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute." MCL 450.681. If AmeriBank was merely engaged in business activity authorized by statute, then its conduct is not the unauthorized practice of law.[2]

The Michigan Savings Bank Act empowers a savings bank to "engage in the business of banking and exercise all powers incidental to the business of banking or which

[2] The "pro se" and "lawful business" concepts have some similarities, and are often confused by the courts, but there are important differences. An activity is pro se if done for one's self regardless of whether it is part of a lawful business, and the "lawful business" exception applies even if the activity is for the benefit of another. Here, both concepts apply.

further or facilitate the purposes of a savings bank" and to "have and exercise the powers and means appropriate to effect the purpose for which the savings bank is incorporated." MCL 487.3401(1), (1)(g). Savings banks are given the power to make and/or arrange loans, either unsecured or secured by a lien on or interest in personal property or real estate. MCL 487.3401(1)(v), (1)(w). Regulation of federal savings banks is similar. The federal Home Owners' Loan Act permits a federal savings bank to make "[l]oans on the security of liens upon residential real property." 12 USC 1464(c)(1)(B). *See also* 12 CFR 560.30. AmeriBank is "lawfully engaged in a business authorized by the provisions of any existing statute" when it makes loans. MCL 450.681. If the preparation of loan documents is "incidental" to the making of those loans, then it is a business activity "authorized by the provision of [an] existing statute" and therefore not the unauthorized practice of law. *Id.*

The question to be decided, then, is whether the preparation of loan documents is incidental to the bank's authorized business of making loans, or is instead a separate business of the practice of law. In *Hulse v Criger*, the Missouri Supreme Court held:

> We think the guiding principle must be whether under the circumstances the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business. The simplicity or complexity of the forms, the nature and customs of the main business involved, the convenience to the public, and whether or not separate charges are made, all have a bearing upon the determination of this question.

363 Mo 26, 48; 247 SW2d 855, 862 (1952).

Clearly, the first three factors – the simplicity of the forms, custom in the industry, and convenience to the public – suggest that the preparation of these documents is ancillary to the making of loans. The Court of Appeals, while recognizing that preparation of loan documents was "otherwise incidental" (Op at 5, Appellant's App at 45a) to the making of

loans, concluded, based upon cases dealing with real estate brokers, that charging a separate fee made the "otherwise incidental" act the practice of law. But broker cases present a different issue. It may make some degree of sense to decide that since brokers are normally fully compensated for all of their costs by their percentage commission, a separate extra charge for preparing legal documents might well indicate that the preparation of documents is a side business, i.e., something that is not part of the broker's normal and customary business.

When that analysis is applied to lenders, however, it breaks down. Lenders are not compensated for their costs with a percentage commission. Instead, they recoup their costs by passing them on to the borrower. Lenders do this with credit report fees, appraisal charges, title searches, courier fees, and so forth. Because this is the "nature and custom" of the lending business, the existence of a separate fee for document preparation does not indicate that the preparation of documents is a side business. Preparing the mortgage and note is necessary to protect the lender's security interest and rights of collection, and the documents are necessary to process the loan and bring it into compliance with federal regulations imposed on the lender. The documents are necessary to allow the loan to be sold on the secondary market. To use the words of *Hulse*, preparation of loan documents is "ancillary to and an essential part of" the business of making loans. The existence of a separate fee, in this context, simply does not indicate that the lender is carrying on a separate business of preparing legal documents for a fee.

III. THE MICHIGAN CONSUMER PROTECTION ACT DOES NOT APPLY TO THE LOANS MADE BY AMERIBANK.

Judge Kolenda dismissed Plaintiffs' MCPA claim on the basis that it was predicated on the alleged unauthorized practice of law and supposedly excessive fee. Since it was neither, the claim failed. (Op at 10, Appellant's App at 37a.) Plaintiffs did not appeal the dismissal of the MCPA claim. Nor did Plaintiffs brief or argue the applicability of the MCPA to

this case in light of *Smith*. In fact, neither of the parties briefed or argued the applicability of Section 4(2) of the MCPA, upon which the Court of Appeals based its decision.[3]

Notwithstanding this lack of briefing, the Court of Appeals reinstated the MCPA count and held that AmeriBank was not exempt from the MCPA by virtue of Section 4(1), because it violated one of the statutes referenced in Section 4(2). Because this issue was neither raised or briefed below, the Court of Appeals decided the issue in a vacuum. As a result, it made four errors in its analysis and holding. While it was clearly correct in its holding that AmeriBank generally satisfied the conditions for exemption from the MCPA pursuant to Section 4(1), it erred when it applied the exception to the exemption contained in Section 4(2). It (1) relied on an amended version of Section 4(2) which did not exist when the lower court decision was rendered; (2) assumed the applicability of the state Savings Bank Act to an organization that was a federal savings bank for most of the time covered by the class period; (3) found a violation of the Savings Bank Act by virtue of a claimed violation of the Credit Reform Act, which does not apply to these transactions; and (4) misread the Credit Reform Act.

A. AmeriBank's Charging of a "Document Preparation Fee" is Exempt from the MCPA Because AmeriBank's Making of Loans was "Specifically Authorized under Laws Administered by a Regulatory Board or Officer Acting under Statutory Authority of this State or the United States."

Section 4(1) of the MCPA provides that "[t]his act does not apply to . . . (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1). In *Smith v Globe Life Insurance Company*, this Court held that Section 4(1) provides an exemption

[3] As discussed in more detail below, the parties' Court of Appeals briefs did not address Section 4(2) of the MCPA because Section 4(2) had no application to savings banks until it was amended effective March 28, 2001 – approximately one year after briefs were filed with the Court of Appeals. AmeriBank did brief the Court of Appeals on its qualification for the Section 4(1) exemption from the MCPA.

from the application of the MCPA if "the general transaction is specifically authorized by law, regardless of whether the specific conduct alleged is prohibited." 460 Mich 446, 465; 597 NW2d 28, 38 (1999).

In *Smith*, this Court held that the defendant insurance company, which was alleged to have breached a credit life insurance contract, qualified for the general exemption under Section 4(1):

> [W]e conclude that § 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such 'transaction or conduct' is 'specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.'

460 Mich at 465; 597 NW2d at 38 (citation omitted).

The Court of Appeals in this case also recognized AmeriBank's qualification for the general exemption under Section 4(1).[4] The Court of Appeals based its finding on the fact that "defendant in the instant case was specifically authorized by law to make loans, MCL 487.3401, and regulated by the Financial Institutions Bureau of this state as well as federal authorities, MCL 445.1601 *et seq.*" (Op at 7, Appellant's App at 47a.[5]) Plaintiffs' MCPA claims should have been precluded by this exemption. However, the Court of Appeals erroneously applied an exception to the exemption. (Op at 7, Appellant's App at 47a.)

[4] Plaintiffs contended in their Brief in Opposition to Application for Leave to Appeal that AmeriBank waived its right to claim an exemption from the MCPA under Section 4(1) by failing to plead the exemption as an affirmative defense and by failing to "meaningfully brief[] the issue to the Court of Appeals." (Plaintiffs-Appellees' Brief in Opposition to Application for Leave to Appeal at 15.) In fact, it would have been impossible for AmeriBank to plead the exemption as an affirmative defense at the trial court level, as the defense is based on this Court's holding in *Smith v Globe Life Insurance Company*. *Smith* was not decided until July 13, 1999 – one day after Judge Kolenda's July 12, 1999 opinion granting AmeriBank's motion for summary disposition in this case. Plaintiffs' claim that AmeriBank failed to "meaningfully" brief the issue to the Court of Appeals is also without merit. AmeriBank devoted a page and a half of its Brief on Appeal to AmeriBank's qualification for the Section 4(1) exemption from the MCPA.

[5] As noted later in this brief, until July 25, 1997, AmeriBank was a federal savings bank that was regulated by the Office of Thrift Supervision under the Home Owners' Loan Act, 12 USC 1461 *et seq.* At all times it was regulated by laws administered by regulatory boards acting under either state or federal law.

B. The Exception to the Exemption Does Not Apply Because Plaintiffs' Claims Do Not Arise out of Misconduct that the Savings Bank Act Makes Unlawful.

In *Smith*, this Court held that Section 4(2) of the MCPA creates an exception to the general exemption provided by Section 4(1). At the time of the *Smith* opinion, Section 4(2) of the Act provided that:

> Except for the purposes of [a private action under MCL 445.911], this act shall not apply to an unfair, unconscionable, or deceptive method, act, or practice which is made unlawful by: (a) Chapter 20 [of the Insurance Code of 1956 and other cited statutes] . . . .

MCL 445.904(2).[6]

This Court construed Section 4(2) as follows:

> Giving effect to both § 4(1) and § 4(2), we conclude that private actions are permitted against an insurer pursuant to § 11 of the MCPA regardless of whether the insurer's activities are 'specifically authorized.' Although § 4(1)(a) generally provides that transactions or conduct 'specifically authorized' are exempt from the provisions of the MCPA, § 4(2) provides an exception to that exemption by permitting private actions pursuant to § 11 arising out of misconduct made unlawful by chapter 20 of the Insurance Code. Therefore, the exemptions provided by §§ 4(1)(a) and 4(2)(a) are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code.

Smith, 460 Mich at 467; 597 NW2d at 39 (emphasis added).

The Syllabus to this Court's opinion in *Smith* succinctly summarizes this analysis: "[P]rivate actions are permitted against an insurer pursuant to § 11 of the act regardless of whether the insurer's activities are specifically authorized. These exemptions are inapplicable to plaintiff's claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code." 460 Mich at 447; 597 NW2d at 29. It follows, of course, that

[6] MCL 445.904 has since been amended to exclude even private actions for unfair, unconscionable or deceptive practices that are made unlawful by chapter 20 of the Insurance Code. The exception for private actions remains for conduct made unlawful under certain other statutes.

a private action against an insurer under the MCPA is not permitted if the claimed misconduct is not made unlawful by the Insurance Code.

Instructed by *Smith*, the Court of Appeals in this case similarly found an exception to the general exemption under Section 4(1).

> However, MCL 445.904(2)(d) provides an exception for actions filed by individual challenging acts or practices made unlawful by the Savings Bank Act. Because defendant's actions were unlawful under the Savings Bank Act, an action under the MCPA is not precluded, regardless of the fact that defendant's general activities were specifically authorized.

(Op at 7, Appellant's App at 47a, emphasis added.) On that basis, the Court of Appeals determined that the trial court erred in dismissing Plaintiffs' MCPA claims.

The Court of Appeals erred in concluding that Section 4(2)(b) provides an exception to AmeriBank's general exemption from the MCPA. First, the cited exception did not become effective until March 28, 2001 – more than two years after Plaintiffs filed their complaint and one-and-a-half years after Judge Kolenda's opinion. Second, AmeriBank was not even subject to the Savings Bank Act until July 25, 1997, thereby negating the Section 4(2)(b) exception for all members of Plaintiffs' class whose loans closed before that date. Finally, the holding is predicated upon a determination that Defendant's conduct is actionable under the Credit Reform Act, which by its terms does not apply. Even if it did, that Act would actually authorize the charge to Plaintiffs in this case.

1. MCL 445.904(2)(b), which allows a private cause of action under the MCPA for conduct made unlawful by the Savings Bank Act, did not exist until more than two years after the applicable class period.

As mentioned above, Section 4(2)(d) of the MCPA currently provides an exception to the general exemption under Section 4(1) for a private cause of action that is based on conduct that the Savings Bank Act makes unlawful. MCL 445.904(2)(d). The Court of

Appeals relied on that provision, but because the issue was never briefed in the context of the MCPA, the Court of Appeals was apparently unaware of the fact that this provision was part of an amendment to the MCPA which became effective March 28, 2001. Michigan Consumer Protection Act, 1976 PA 331, as amended by 2000 PA 432. Before that date, Section 4(2) provided an exception to the Section 4(1) exemption for conduct made unlawful by the Insurance Code, the Banking Code of 1969, the Public Service Commission Enabling Act, the Motor Carrier Act or the act governing nonprofit dental care corporations. The 2001 amendment removed the reference to nonprofit dental care corporations and added new references to the Credit Union Act and the Savings Bank Act.[7] As mentioned above, the amendment also negated the exception to the Section 4(1) exemption for conduct made unlawful by the Insurance Code.

2. AmeriBank was not subject to the Michigan Savings Bank Act until July 25, 1997.

Even if the exception under Section 4(2)(d) for conduct unlawful under the Savings Bank Act applies to claims that arose before March 28, 2001, the exception would not

[7] If the Court of Appeals intended to give the amendment retroactive effect, it did so without briefing, without argument, without discussion, without reason, and in error.

A new or amended statute generally applies prospectively unless (1) the statute is procedural or remedial or (2) the legislature indicated an intention that it have retroactive effect. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698, 702 (1992). In *Hansen-Snyder Company v General Motors Corporation*, this Court advised that a statute is to be given prospective effect if retroactive application would "interfere with an existing contract, destroy a vested right, create a new liability in connection with a past transaction or invalidate a defense which was good when the statute was passed." 371 Mich 480, 484; 124 NW2d 286, 288 (1963). In this case, the amendment would both invalidate an existing defense under the MCPA and create a new liability under that statute.

The amendment, if applied retroactively, would preclude AmeriBank's Section 4(1) defense – a defense to which AmeriBank was entitled when Plaintiffs' cause of action accrued, Plaintiffs' complaint was filed, summary disposition was granted, and this appeal was filed. Because the amendment would deprive AmeriBank of an existing defense, the amendment should not be applied retroactively. *Borkus v Mich Nat'l Bank*, 117 Mich App 662, 669; 324 NW2d 123, 126 (1982) ("A statute will be given prospective effect and will not invalidate a defense which existed prior to its enactment.").

Nor was there any indication that the legislature intended for the amendment to operate retroactively. The legislature did not even call for the amendment to the MCPA to take immediate effect. It was passed by the governor on January 9, 2001, and given an effective date of March 28, 2001. *See Harris v Pa Erection & Constr,* 143 Mich App 790; 372 NW2d 663 (1985) (legislature could have provided for retroactive effect in the amendment, but instead provided for a specific effective date).

apply in this case to the claim of any class member whose loan was made before July 25, 1997. Until that date, AmeriBank was not a Michigan savings bank and was not subject to the Savings Bank Act.

On February 14, 1996, AmeriBank Federal Savings Bank was merged into Ottawa Savings Bank, which was also a federal savings bank. Neither of these entities was regulated under Michigan law, let alone the Michigan Savings Bank Act. In fact, the Michigan Savings Bank Act did not even become effective until July 1, 1996. Savings Bank Act, 1996 PA 354. The surviving entity, Ottawa Savings Bank, changed its name to AmeriBank on August 19, 1996. AmeriBank remained a federal savings bank regulated by federal law until July 25, 1997, when it was converted to a Michigan savings bank. (*See* Certified Copy of Articles of Incorporation for AmeriBank, Appellant's App at 1a-5a; Correspondence from Michigan Office of Financial and Insurance Services, Appellant's App at 48a.[8])

AmeriBank did not become subject to the Savings Bank Act until July 25, 1997, the date that it became a Michigan savings bank. Therefore, AmeriBank could not be considered to have engaged in an "unlawful" act under the Savings Bank Act before that date.

3. AmeriBank did not engage in conduct that the Michigan Savings Bank Act makes unlawful.

Even if the Court determines (1) that AmeriBank has engaged in the unauthorized practice of law, (2) that the exception under Section 4(2)(d) for conduct that the Savings Bank Act makes unlawful somehow applies to a claim that arose before March 28, 2001, and (3) applies to claims which arose before AmeriBank was even subject to the Savings Bank Act, the MCPA does not apply because AmeriBank has not violated the Savings Bank Act.

[8] These documents were not a part of the record below because, as noted above, neither party briefed the applicability of Section 4(2) of the MCPA or the applicability of the Savings Bank Act to AmeriBank.

As noted above, the Court of Appeals held that AmeriBank's conduct is generally exempt from the application of the MCPA because AmeriBank is specifically authorized by the Savings Bank Act to make loans, and it is regulated by state and federal regulatory authorities. (Op at 7, Appellant's App at 47a; MCL 487.3401; MCL 445.1601 *et seq.*) The exemption applies and precludes a private cause of action against AmeriBank unless the "unfair, unconscionable, or deceptive method, act, or practice" alleged by Plaintiffs in their complaint "is made unlawful by" the Savings Bank Act. MCL 445.904(2).

The Court of Appeals concluded that AmeriBank engaged in conduct made unlawful by the Savings Bank Act, based on the following faulty reasoning:

- The Savings Bank Act incorporates by reference the Credit Reform Act. MCL 487.3430(1)(a).
- Although the Credit Reform Act allows a bank to charge fees agreed to or accepted by the borrower, those fees may not be "excessive." MCL 445.1857(1); MCL 445.1857(3).
- Since the Court of Appeals was of the opinion that filling in the blanks on a form document constituted the unauthorized practice of law, the fee for that practice was also unauthorized.
- Because the fee was unauthorized, it was excessive.
- Since the fee was excessive under the Credit Reform Act, the charging of that fee was "unlawful" under the Savings Bank Act.

The analysis is faulty for several reasons.

a. The Credit Reform Act does not apply to the type of loans AmeriBank made to Plaintiffs and members of the class.

The Court of Appeals' finding that AmeriBank violated the Savings Bank Act is predicated on the court's assertion that the fee charged by AmeriBank violated the Credit Reform Act. (Op at 6, Appellant's App at 46a.) In fact, the Credit Reform Act does not even apply to the type of loans that AmeriBank extended to the class.

Section 7 of the Credit Reform Act describes certain fees and charges that a depository institution may charge on transactions to which the Act applies. Section 7(1) provides:

> In addition to the interest or finance charges that are authorized under section 4, a depository institution may charge, collect, and receive from a borrower or buyer all fees and charges that are agreed to or accepted by the borrower or buyer including those related to making, closing, processing, disbursing, extending, committing to extend, readjusting, renewing, collecting payments upon, or otherwise servicing an extension of credit or any occurrence or transaction related to an extension of credit.

MCL 445.1857(1) (emphasis added).

The Credit Reform Act defines an "extension of credit" as:

> [A] loan or credit sale made by a regulated lender. An extension of credit does not include an extension of credit described in section 501(a)(1) of title V of the depository institutions deregulation and monetary control act of 1980, Public Law 96-221, 12 U.S.C 1735f-7 nt.

MCL 445.1852(g). As Plaintiffs concede, AmeriBank's loans to the class were loans described in this federal statute. (*See* Plaintiffs-Appellants' Brief on Appeal in the Court of Appeals, dated January 24, 2000, at 20 n12, Appellant's App at 40a.)

Because the loans AmeriBank made to the class are of the type described in Section 501(a) of Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), the loans do not constitute an "extension of credit" under the Credit Reform Act. Therefore, the fee limitations, which the Court of Appeals held AmeriBank had exceeded, do not apply to the loans, which are the subject of this action. Without a violation of the Credit Reform Act, there is no basis for the Court's conclusion that AmeriBank violated the

Savings Bank Act and, therefore, no basis for the exception to the exemption contained in MCPA Section 4(1).[9]

But that was not the only error of the analysis.

b. AmeriBank did not charge an "excessive fee" as that term is defined in the Credit Reform Act.

Even if this Court finds that AmeriBank (1) engaged in the unauthorized practice of law, (2) is subject to the Savings Bank Act exception to the MCPA, and (3) made loans to Plaintiffs that were subject to the Credit Reform Act, there is still no basis for the finding that the fee was "excessive" under the Credit Reform Act.

As explained above, Section 7(1) of the Credit Reform Act generally allows a depository institution to charge any fee that is accepted and agreed upon by the borrower. MCL 445.1857(1). Plaintiffs accepted and agreed to AmeriBank's document preparation fee. It was disclosed in AmeriBank's Good Faith Estimate, which Plaintiffs acknowledged by signing. (Good Faith Estimate, Appellant's App at 6a.) Plaintiffs also signed a HUD-1 settlement statement, approving the disbursement of the document preparation fee to AmeriBank. (HUD-1 Statement, Appellant's App at 8a.) Since Plaintiffs agreed to and accepted AmeriBank's document preparation fee, the fee was of a kind expressly permitted by Section 7(1) of the Credit Reform Act, if it applied. If the Savings Bank Act is deemed to have incorporated the Credit Reform Act by reference, then the fee was also permitted by the Savings Bank Act.

The Court of Appeals correctly noted that Section 7(3) of the Credit Reform Act limits the fees permitted under Section 7(1) to those that are "not excessive." MCL 445.1857(3);

[9] In its Brief in Opposition to Application for Leave to Appeal, Plaintiffs summarized AmeriBank's argument as "mortgage loans are immune from regulation by virtue of DIDMCA." (Plaintiffs-Appellees' Brief in Opposition to Application for Leave to Appeal at 19.) AmeriBank argues nothing of the kind. Mortgage loans are subject to numerous regulations, but the fee limitation under the Credit Reform Act does not happen to be one of them. Similarly, Plaintiffs implied that AmeriBank believes the MCPA never applies to banks.

Op at 6, Appellant's App at 46a. However, the Court of Appeals erred when it concluded that the document preparation fee AmeriBank charged was "excessive" because it was unauthorized:

> Charging a fee for the preparation of legal documents constitutes the unauthorized practice of law under MCL 450.681. Thus, the grant of authority in the Credit Reform Act to charge non-excessive fees does not authorize a document preparation fee for legal documents because such fees would be in violation of MCL 450.681. Therefore, defendant was not authorized by law to charge a document preparation fee for plaintiffs' mortgage.

(Op at 6, Appellant's App at 46a.)

The Court of Appeals misread the Credit Reform Act. Under the Credit Reform Act, an excessive fee means "a fee or charge that exceeds the amount allowed in section 6(1), (2) or (3), section 7, or any other applicable law or statute of this state." MCL 445.1852(f). Sections 6(1), 6(2), and 6(3) limit (i) a loan processing fee to 2 percent of the amount of the extension of credit, (ii) a late fee to the greater of $15 or 5 percent of the installment payment, and (iii) a fee for a dishonored check to $25. MCL 445.1856(1)-(3). Section 7, as noted above, permits fees agreed to by the borrower. MCL 445.1857(1).

The fee can only be considered to be "excessive" under the Credit Reform Act if it exceeds the specific amounts set forth in the referenced section elsewhere in applicable law or statute. The document preparation fee AmeriBank charged Plaintiffs does not exceed any of these amounts.

The Court of Appeals apparently concluded that the document preparation fee exceeded the amount set forth in MCL 450.681 because the practice for which the fee was charged was unauthorized. It erred. MCL 450.681 does not establish any limit on fees, and the MCPA does not prohibit fees for unauthorized acts. It deals only with the amount of the fees.

(Plaintiffs-Appellees' Brief in Opposition to Application for Leave to Appeal at 16-17.) In fact, AmeriBank argues only that the MCPA does not apply to this particular bank under these particular circumstances.

CONCLUSION

The decision of the Court of Appeals declares unlawful a practice that is both widespread and beneficial to consumers of financial services. The holding that it violates a statute dealing with the regulation of the practice of law for a bank to fill in the blanks on a standard form loan document for its own protection and pass the cost of doing so on to the customer elevates semantics over the teachings of this Court, longstanding industry practice, and common sense. And its holding – not requested, argued or briefed by Plaintiffs – that the conduct is actionable under the MCPA because of a violation of the Savings Bank Act is devoid of support, factually or legally.

AmeriBank respectfully requests that the Court reverse the holding of the Court of Appeals, and reinstate the decision of the Circuit Court.

DATED: June 18, 2002

Respectfully submitted,

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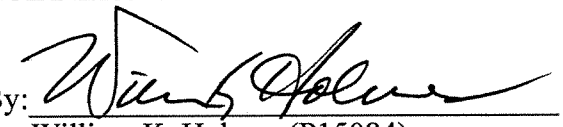
By: 

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